FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 16 1946
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**October Term, 1946**

**Nos. 377, 452**

JOSEPH S. FAY AND JAMES BOVE,
*Petitioners,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN,
*District Attorney,*
*New York County.*

WHITMAN KNAPP,
JOSEPH A. SARAFITE,
*Assistant District Attorneys,*
*Of Counsel.*

September 1946.

## SUBJECT INDEX


| | PAGE |
|---|---|
| Proceedings Below | 1 |
| Nature of the Prosecution | 2 |
| Questions Presented and the Respondent's Position | 3 |
| Statutory Provisions Concerning General and Special Jurors; and Their Application to the Case at Bar | 3 |
| Qualifications of General Jurors | 4 |
| Additional Qualifications of Special Jurors | 5 |
| Circumstances Under Which a Special Jury May Be Drawn | 6 |
| Judicial Interpretation of the Special Jury Statute | 6 |
| The Application of the Foregoing Statutory Provisions to the Case at Bar | 7 |
| Evidence Concerning the Selection of General and Special Jurors | 9 |
| Procedure for Selecting the 63,000 Trial Jurors Comprising the General and Special Jury Panels | 9 |
| The Selection of the "List of Special Jurors" | 11 |
| The "Select Wheel" | 11 |
| The Petitioners' "Survey" | 13 |
| ARGUMENT—No Substantial Question is Presented | 13 |
| Conclusion | 20 |
| Appendix A | 21 |

## Table of Cases.


| | PAGE |
|---|---|
| Akins v. Texas, 325 U. S. 398, 402, 403, 404 | 15, 18 |
| Bush v. Kentucky, 107 U. S. 110 | 18 |
| Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 612 | 8 |
| Glasser v. United States, 315 U. S. 60, 80, 83-84, 86-87 | 8, 18, 19 |
| Hale v. Kentucky, 303 U. S. 613, 614 | 18 |
| Hill v. Texas, 316 U. S. 400, 403, 404 | 17, 18 |
| Hollins v. Oklahoma, 295 U. S. 394, 395 | 18 |
| Neal v. Delaware, 103 U. S. 370, 397 | 18 |
| Norris v. Alabama, 294 U. S. 587, 596 | 18 |
| People v. Alexander, 293 N. Y. 870 | 12, 14 |
| People v. Bernoff, 266 App. Div. 918 | 14 |
| People v. Buchalter, 262 App. Div. 738 | 15 |
| People v. Chrisoulas, 367 Ill. 85, 88, 10 N. E. (2d) 382, 384 | 12 |
| People v. Comprodaily Pub. Co., 262 App. Div. 1008 | 15 |
| People v. Dunn (1899), 157 N. Y. 528, 532, 537 | 6, 7 |
| People v. Elia, 262 App. Div. 836 | 14 |
| People v. Gallagher, 288 N. Y. 674 | 14 |
| People v. Gibbs, 259 App. Div. 701 | 14 |
| People v. Greenberg, 268 App. Div. 1028 | 14 |
| People v. Hines, 284 N. Y. 93 | 14 |
| People v. Kuhn, 262 App. Div. 718 | 14 |
| People v. Lewis, 238 N. Y. 1, 5 | 2 |
| People v. Moran, 259 App. Div. 716 | 14 |
| People v. Mullens, 265 App. Div. 1042 | 14 |
| People v. Rabenold, 287 N. Y. 832 | 12, 14 |
| People v. Renda, 269 App. Div. 736 | 14 |

PAGE

People v. Scalise, 288 N. Y. 220 ..... 14
People v. Schwartz, 270 App. Div. 218 ..... 12, 14
People v. Scotti, 268 App. Div. 761 ..... 14
People v. Tweed (1876) 50 How. Pr. 262, 263 ..... 6
Pierre v. Louisiana, 306 U. S. 354, 359 ..... 18
Rawlins v. Georgia, 201 U. S. 638, 640 ..... 19
Smith v. Texas, 311 U. S. 128 ..... 17
Strauder v. West Virginia, 100 U. S. 303, 310 ..... 3, 18
Thiel v. Southern Pacific, 66 Sup. Ct. Rep. 984, 985, 986, 988; 90 Law Ed. (Adv.) 922, 924, 926 ..... 18, 19

**Statutes Cited.**

Constitution of the United States, 14th Amendment ..... 3, 13
United States Code, Title 8, § 44 ..... 3
New York Judiciary Law:
Section 596 ..... 4
Section 597 ..... 4
Section 599 ..... 4
Section 749-aa ..... 3, 4, 5, 6
New York Laws of 1786, ch. 41, pp. 279-280 ..... 6
New York Laws of 1896, ch. 378, §§ 8, 13 ..... 6
New York Penal Law:
Section 580 ..... 1
Section 850 ..... 1
Section 851 ..... 1
New York Revised Statutes (1829) Vol. 2, p. 418, § 46 ..... 6

**Other Authority.**

World Almanac (1946) p. 523 ..... 9

# Supreme Court of the United States

**October Term, 1946**

**Nos. 377, 452**

---

JOSEPH S. FAY AND JAMES BOVE,

*Petitioners,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Proceedings Below

Petitioners were convicted of two separate crimes of CONSPIRACY and EXTORTION (Penal Law, §§ 580, 850, 851) by judgments of the Supreme Court, New York County, rendered on April 5, 1945 (70, 1141-2).* The judgments of conviction were affirmed, with prevailing and dissenting opinions, by the Appellate Division of the Supreme Court (1170-81; 270 App. Div. 261); and were unanimously affirmed, without opinion, by the Court of Appeals (1185-7). The proceedings in the courts below are, so far as here relevant, set forth at pages three to six of the petition of Joseph S. Fay (hereinafter referred to as "the petition").

---

* Unless otherwise indicated, references are to pages of the printed record.

## Nature of the Prosecution

The petitioners Fay and Bove were vice-presidents, respectively, of the International Union of Operating Engineers and of the International Hod Carriers, Building and Common Laborers Union of America. The indictment, containing one misdemeanor conspiracy count and six felony extortion counts, charged the petitioners with conspiring to extort over $700,000, and with the actual extortion of over $400,000, from persons engaged in the construction of the Delaware Aqueduct—an integral part of New York City's water supply system.

Payments to the petitioners totalling over $300,000 were established by the evidence. Petitioners did not take the witness stand in their own behalf. Through counsel, they conceded personally receiving the monies in question, but contended that the payments had constituted bribery rather than extortion (945-6; see 985). The trial court—in a charge to which no exception was taken and which "constitutes the law of the case" (*People* v. *Lewis*, 238 N. Y. 1, 5)—thus stated the issue presented to the jury (1061):

> "Was the money paid as a bribe, willingly, for services which the contractors expected to receive? Or was it paid over by threats which the defendants conveyed to the contractors? That is the sole issue in this law suit."

Upon the narrow—and concededly unpopular (Fay's summation, 946)—defense thus interposed, the jury acquitted the petitioners on three of the substantive felony counts submitted to it, disagreed on a fourth, and convicted upon the general conspiracy count and one felony count involving a $62,000 payment (1097-9).

## Questions Presented and the Respondent's Position

The jury which thus convicted the petitioners was drawn from a "List of special jurors" numbering about three thousand persons selected in the manner prescribed in Section 749-aa of the New York Judiciary Law (see Appendix to the petition, pp. 17-22). The sole argument now advanced is that "women and laborers were largely, systematically, and intentionally, excluded" from this list of special jurors and that in consequence, the list was so "heavily weighted in favor of the economically and socially privileged" that any trial before a jury drawn therefrom must necessarily have denied the petitioners equal protection of the laws and due process of law in violation of the Fourteenth Amendment (see "Question presented," petition, p. 2; also pp. 13, 14).

It is the respondent's position that the record not only fails to disclose discrimination against any class or category of persons but that it affirmatively establishes its absence.[1]

## Statutory Provisions Concerning General and Special Jurors; and Their Application to the Case at Bar

In all counties of the State of New York having a population of one million or more inhabitants, two lists of trial jurors are provided by statute: a general list, and a "List of special jurors" selected from "persons qualified to serve as trial jurors" (Judiciary Law, § 749-aa, subd. 1). In New

---

[1] The question whether discrimination along economic lines would raise constitutional problems similar to those presented by the exclusion of jurors on account of race or color (*cf. Strauder v. West Virginia*, 100 U. S. 303, 310; U. S. C. Title 8, § 44) is not presented by the evidence in this case.

York County, the general list numbers about sixty thousand persons, and the special list about three thousand (82-3). Section 749-aa of the Judiciary Law, which relates exclusively to special jurors, is printed as an appendix to the petition (pp. 17-22). Sections 596, 597 and 599 of that law, which state the qualifications and exemptions of general jurors in the five counties comprising New York City are printed as an appendix to this brief (*infra*, pp. 21-23).

**Qualifications of General Jurors**

So far as here relevant, Section 596 of the Judiciary Law (*infra*, p. 21) provides that a trial juror must be between the ages of twenty-one and seventy; must be the owner of real or personal property of the value of $250, or be the spouse of such a person; must be intelligent, of sound mind and good character, well informed, able to read and write English, and "not infirm or decrepit"; and must never have been convicted of a felony or of a misdemeanor involving moral turpitude.

Section 597 provides that while persons having "conscientious scruples against the death penalty" may be placed on the general jury list, they may not serve in "a criminal action where the crime charged is or may be punishable by death."

Subdivision 7 of Section 599 gives women an absolute exemption from all jury duty.

**Additional Qualifications of Special Jurors**

So far as relevant to the instant case, Section 749-aa (subd. 2) excludes from the list of special jurors any person otherwise qualified for jury service who:

(a) "doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression"; or

(b) has such "opinion as to circumstantial evidence • • • as would prevent his finding a verdict of guilty upon such evidence"; or

(c) "avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense"; or who

(d) "avows that he cannot in all cases give to a defendant, who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal [so] to testify • • • shall not create any presumption against him."

In addition, Section 749-aa excludes from the special jury list any person who has been convicted of a criminal offense (even if it be a misdemeanor not involving moral turpitude); who has been found guilty of fraud or other misconduct by the judgment of any civil court; or who possesses conscientious scruples about the death penalty; or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation thereof.

### Circumstances Under Which a Special Jury May Be Drawn

According to subdivision 4, Section 749-aa, applications for special juries are addressed to the discretion of the trial court, may be made by either side, and must be based on a showing that:

(a) "by reason of the importance or intricacy of the case, a special jury is required"; or

(b) "the issue to be tried has been so widely commented upon * * * that an ordinary jury cannot without delay and difficulty be obtained"; or that

(c) for any other reason "the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury."

### Judicial Interpretation of the Special Jury Statute

Some form of special or "struck" jury has been provided by the statutes of New York ever since 1786 [see Laws of 1786, ch. 41, pp. 279-280; 2 Rev. Stat. (1829) p. 418, § 46; *People* v. *Tweed* (1876) 50 How. Pr. 262, 263]. The predecessor of the present statute was enacted in 1896 (Laws of 1896, ch. 378), and its provisions, so far as pertinent to the present proceeding, have not been materially changed since that date (*cf.* Laws of 1896, ch. 378, §§ 8, 13 with Judiciary Law, § 749-aa, subds. 2, 4).

Shortly after its enactment, the purpose and effect of this parent statute were authoritatively defined by the highest court of New York [*People* v. *Dunn* (1899) 157 N. Y.

528]. The Court of Appeals then declared (157 N. Y., at p. 532):

> "It must be perfectly apparent that the act has but the one direct object of facilitating the administration of justice in criminal cases, by providing for the impaneling of a fair, competent and impartial jury, without the difficulty and delay with which the procedure is so frequently attended."

This object was accomplished, the court declared, by investing the officials who select the special panel with the power and duty of eliminating "those who should not sit, or who would be disqualified from acting, in the criminal branch of the court, whether from the standpoint of the prosecution, or of the defendant" (157 N. Y., at p. 537).

**The Application of the Foregoing Statutory Provisions to the Case at Bar**

It is at once apparent from the record that any juror impanelled to try the instant case should have possessed all four of the statutory qualifications set forth at page 5, *supra*.

a. The extent to which the case had been commented upon in the press was established by affidavits and evidence produced by petitioners themselves (53, 140-6; Defts' Exh. D-3); and by a decision of the Supreme Court, New York County, granting petitioners' motion to remove the case from the Court of General Sessions on the ground, among others, that unusual publicity had been accorded the matter. The Supreme Court then observed (54; 48 N. Y. S. (2d) 2, 4):

> "The newspapers have not neglected these defendents. Fay, in particular, has been described in

terms neither complimentary nor doubtful. Some of the comments roundly condemn his organization, his associates and their practices."

It was therefore vital to eliminate any juror who doubted "his ability to lay aside an opinion or impression formed from newspaper reading * * *, or to render an impartial verdict upon the evidence uninfluenced by any such opinion or impression."

b. The basic charge of the indictment returned against the petitioners was that they were guilty of a general "conspiracy" to commit the crime of extortion (6-10). It is obvious that such a charge must ordinarily be proved by circumstantial evidence (see *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 612; *Glasser* v. *United States*, 315 U. S. 60, 80); and that no juror whose "opinion as to circumstantial evidence * * * would prevent his finding a verdict of guilty upon such evidence" would be competent to serve.

c. As already noted (*supra*, p. 2), the petitioners interposed a peculiarly unpopular defense of which, as Fay's counsel frankly recognized, a jury might well be expected to "disapprove," (946). It was therefore important that no juror be selected who harbored "such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense".

d. Neither petitioner took the witness stand in his own defense, which made it essential that the jury be composed of persons able to give them "the full benefit of the statutory provision that such * * * neglect or refusal to testify * * * shall not create any presumption against" them.

## Evidence Concerning the Selection of General and Special Jurors

The petitioners relied exclusively upon the testimony of three witnesses to support the challenge to the array: Deputy County Clerks James McGurrin and Thomas F. Kane, who described the methods by which jury lists were prepared in New York County; and Warren H. Mayell, a lawyer associated with petitioner Fay's attorney of record, who produced a "survey" or chart (Defts' Exh. D-2) purporting to classify the 3,000 special jurors according to the occupations given by them in questionnaires (see Defts' Exh. D-1) filed at the County Clerk's office.

### Procedure for Selecting the 63,000 Trial Jurors Comprising the General and Special Jury Panels

There are about 755,000 registered voters in New York County,[2] who constitute its principal source of trial jurors (85). The task of reducing this number to the required 63,000 special and general jurors is entrusted to the Division of Jurors of the County Clerk's office (81-2). The witness McGurrin is in charge of that Division (81). He is assisted by the witness Kane, conceded by the petitioners to be "eminently qualified" for his position (97); by three "examiners" (87, 89); and by an unspecified number of clerks.

Prospective jurors are summoned to the County Clerk's office by notices sent to persons taken from the voting registry, the census list, the tax lists, the telephone directory and from "any other available source" (85-6, 125)—the voting registry being the "most prolific source" (85). Upon arriving at the office, each prospective juror is given a comprehensive questionnaire (1146; Defts' Exh. D-1) which he

[2] World Almanac (1946), p. 523.

is required to complete at the office without assistance, his ability to do so intelligently being one of the principal tests of his suitability for jury service (86-8, 193). He is then taken before one of the examiners, who goes over the questionnaire, "perhaps asks some supplementary questions," and then determines whether he should be rejected as unsuitable for jury service, placed on the general list, or referred to one of the deputy county clerks as a prospective special juror (87-8; see *infra*, p. 11).

Women being entitled to an absolute statutory exemption (Judiciary Law, § 599, subd. 7; *infra*, pp. 22-23), a different initial procedure is followed in their case. It having been found impractical to compel women to appear for examination, notices are sent only to volunteers, or to those recommended by other women (125) or by various civic organizations—including the "League of Women Voters" (85). However, when a woman appears at the county clerk's office, she goes through precisely the same procedure as a man with respect to her availability both as a general or as a special juror (see 86, 95). In this manner, it has been possible to place "seven or eight thousand" women on the jury lists—despite the statutory exemption (113).[3]

---

[3] In view of the great emphasis the petitioners place upon the "League of Women Voters" (petition, pp. 8, 12), it is interesting to note that this organization boasts only 2,162 members in New York County (information obtained at the office of the New York City League of Women Voters, 461 4th Avenue, New York 16, N. Y.). Therefore, even if we were to assume—without any supporting evidence—that the League had been successful in getting 100% of its membership registered for jury service, the record would still be a long way from suggesting that New York County's women jurors were taken "exclusively from its [the League's] membership" (see *Glasser* v. *United States*, 315 U. S. 60, 84). It may be of some significance that, of the three women examined on the *voir dire* (305-8, 357-62, 442-3), one was a former member of "The Teachers Union, Local 5[illegible] (307), and one was a "full-time Red Cross volunteer worker" who "occasionally" read *The Daily Worker* (358, 361). The latter was "satisfactory" to both sides and served on the jury (362).

**The Selection of the "List of Special Jurors"**

The "examiners" who see each prospective juror after his questionnaire is completed (*supra*, p. 10), are under instructions to be "on the lookout" for men and women who are "available for service any * * * month of the year" (93, 126; *infra*, pp. 11-12), and who "meet all the requirements of the Special Jury Law, and generally appear to be intelligent jurors" (89-93, 125-6). As such persons are found, they are referred to Deputy County Clerks McGurrin or Kane who "then examine them and decide whether or not to place them on the special jury list" (126; also 95).

In making this final decision, the deputy county clerks —like the examiners—are governed by a desire to find intelligent jurors who, among their other qualifications, will not be "influenced by the failure of [a] defendant to take the stand" or "prejudiced against any defense that the defendant might interpose," and who will "give every class of defendants" a "fair" and "proper" trial (127, 132; also 96, 103-4).

A talesman's availability for the special list is not dependent upon his or her formal education (106, 132), occupation or calling (106-7), or upon his or her place of residence—so long as that be within the county (107-10, 120). No person is ever placed on the special jury list as a result of recommendation by "any body, public or civic" (114).

The special jury list, a permanent rather than an annual compilation, is subject to constant revision by adding new names to take the place of jurors who move out of the county or otherwise become disqualified (112).

**The "Select Wheel"**

In the case of the general list, the county clerk—with the approval of the Appellate Division of the New York

Supreme Court—has established a system whereby jurors may select the months in which they can most conveniently serve, and be assured that they will not be called at any other time [12]-2; *cf. People* v. *Chrisoulas*, 367 Ill. 85, 88, 10 N. E. (2d) 382, 384].

To this end, the questionnaire (Defts' Exh, D-1)—which was "prepared by the Appellate Division" (121)—contains the following:

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)_____"

The name of any juror who states a preference is placed in a "select wheel" from which it can be drawn only during the months designated (121-2). Jurors expressing no preference are placed in a "general wheel" and are subject to call at any season (*id.*).

In the case of the special list (which numbers only 3000), it has been found impractical to establish such a "select wheel." As Mr. McGurrin testified, "we can't accept a special juror who can serve only certain months of the year," because "a special juror must be available at all times for service, any month" (115). Accordingly, jurors having a preference as to months of service are not placed on the special list (93, 115-7).[4]

---

[4] Although the fact does not appear in the instant record, it is well known that special juries are frequently called in long and complicated cases in which the trial may not be completed until months after the court has ordered the drawing of the required number of special jurors. Thus, for example, in *People* v. *Schwartz*, 270 App. Div. 218, the drawing of a special panel was ordered on the 18th of October, 1943, the jurors then drawn were not—because of intervening adjournments—actually summoned to court until the 7th of February of the following year, and the verdict was not rendered until the 4th of April (*Schwartz* Record on Appeal, pp. 84-87); in *People* v. *Alexander*, 293 N. Y. 870, the corresponding dates were November 3rd, January 27th and March 28th (*Alexander* Record on Appeal, pp. 17-19); and in *People* v. *Rabenold*, 287 N. Y. 832, they were January 23rd, February 26th and March 19th (*Rabenold* Record on Appeal, pp. 43-44). It is obvious that no "select wheel" system could be operated under such conditions.

### The Petitioners' "Survey"

The "survey" presented by the witness Mayell—upon the basis of which petitioner asserts that the special panel was "composed primarily of bankers, manufacturers, executives, stock brokers, and the like, in number wholly out of proportion to their numerical significance in the community as a whole" (petition, p. 9)—classified the jurors on the special list according to the "occupations" stated on their questionnaires (134).

This survey purported to give no information as to the positions held by the various jurors within their respective industries or occupational groups (136-8). No evidence was offered to indicate to what extent—if any—the occupational groups found on the special list were out of proportion to their representation in the county at large; nor is there evidence that the special list was, in this respect, any different from the concededly fair general panel.

## ARGUMENT

### No Substantial Question is Presented.

Petitioners contend that they have been deprived of due process and equal protection of the law under the Fourteenth Amendment, in that they were tried before jurors drawn from a panel selected in a deliberately discriminatory fashion. The discrimination, it is alleged, consisted in the selection of the "economically and socially privileged" to the exclusion of "persons of humble station in life," so that the panel became an instrument for protecting "the interests of capital," while oppressing "laboring men" and

their representatives (petition, pp. 2, 4, 13-15).[5] However,

[5] The utter absurdity of suggesting that the special panel has been deliberately weighted in favor of the "economically and socially privileged" can be seen by examining the cases in which the panel has been used. Of the seventeen reported non-capital cases arising in New York County since 1938, when the present law was adopted, only three concerned defendants claiming to be labor leaders or "persons of humble station in life" (*People* v. *Scalise*, 288 N. Y. 220; *People* v. *Elia*, 262 App. Div. 836; *People* v. *Bernoff*, 266 App. Div. 918), while twelve involved defendants whom the petitioners would necessarily classify as belonging to the "upper stratum of economic and social life," as shown by the following table:

| *People* v. | *Crime Charged* | *Citation* | *Defendant's Occupation* |
|---|---|---|---|
| Gibbs | larceny | 259 App. Div. 701 | insurance |
| Hines | conspiracy | 284 N. Y. 93 | insurance |
| Moran | bribery | 259 App. Div. 716 | attorney |
| Kuhn | larceny | 262 App. Div. 718 | president, German-Am. Bund |
| Rabenold | forgery | 287 N. Y. 832 | bank president |
| Gallagher | larceny | 288 N. Y. 674 | attorney |
| Alexander | manslaughter | 293 N. Y. 870 | lumber dealer |
| Mullens (2 defendants) | bribery | 265 App. Div. 1042 | a retired businessman and an insurance broker |
| Scotti | larceny | 268 App. Div. 761 | lawyer |
| Schwartz (4 defendants) | usury and forgery | 270 App. Div. 218 | a banker and three of his associates |
| Renda | manslaughter (abortion) | 269 App. Div. 736 | doctor |
| Greenberg | income tax violation | 268 App. Div. 1028 | clothing manufacturer |

Perhaps most illustrative are the cases of *People* v. *Alexander* and *People* v. *Schwartz*. In the *Alexander* case, the defendant was a wealthy owner of tenement houses who had neglected to comply with the safety provisions of the Tenement House Law. His conviction for manslaughter grew out of a fire in which seven of his Chinese tenants had lost their lives. The defendants in the *Schwartz*

petitioners have not only failed to produce evidence to support this grave accusation, but have affirmatively established that the special panel was selected by precisely the same men under exactly the same conditions as the concededly fair general list—before which the petitioners specifically asked to be tried (see 55-7, 64).

Both lists are prepared by the New York County Clerk's Division of Jurors under the general supervision of the witness McGurrin (81-3). Names for both lists are drawn from "All available sources—registration lists, tax lists, census lists, telephone directories" (83, 85-6, 125), the voting registry constituting "the most prolific source" (85); the qualifications of every candidate must be passed upon by one of the three "examiners" before he is placed on either list (87-8, 124, 126; *cf. Akins* v. *Texas*, 325 U. S. 398, 403). These very same examiners then decide what talesmen should be referred to Deputy County Clerks McGurrin or Kane (95), who have the final responsibility for making up the special jury lists (95-6, 104, 125).

Three of the five persons involved in this process were not even called to the witness stand. The petitioners specifically admitted that one of them (Kane) was "emi-

---

case were the owners and operators of a widely known small-loan company which had violated the usury laws in its dealings with impecunious borrowers. Certainly, the district attorney would not have asked for a special jury in either of those cases if he had been in any fear that the list was comprised of jurors prejudiced "in favor of the interests of capital" and against "persons of humble station in life."

(In the foregoing tabulation, capital cases have not been taken into account because they invoke a provision of the special jury law not here involved (see p. 5, *supra*; *cf. People* v. *Hall*, 169 N. Y. 184, 196). Classification of *People* v. *Buchalter*, 262 App. Div. 738, and *People* v. *Comprodaily Pub. Co.*, 262 App. Div. 1008, is impossible. In the *Buchalter* case the two principal defendants were out-and-out gangsters with no known "occupations"; in the *Comprodaily* case, the defendants were, respectively, a corporation and a communist newspaper editor.)

nently qualified" for his position (97). Two (McGurrin and Kane) testified at length about their methods and motives.

The testimony of the witnesses McGurrin and Kane unequivocally establishes that the selection of talesmen for the special panel was in no way dependent upon their economic status, the nature of their occupations, the extent of their formal education, their place of residence, or upon any factor that might possibly result in discrimination along economic lines (106-7, 110, 120, 132); that the Division of Jurors did not even have any knowledge concerning the composition of the panel along such lines (107, 110); and that the Division's sole concern was to provide a list of special jurors who would meet the statutory qualifications and who would intelligently perform their vital function of giving every defendant a "fair" and "proper" trial (89, 92-3, 96, 127, 131-2).

In refutation of this unequivocal and uncontradicted testimony—all of which was introduced by the petitoners themselves—petitioners can point only to the occupational "survey" produced by the witness Mayell, which survey does not even purport to classify special jurors according to their position in "economic and social society" (*cf.* petition, p. 13), but only according to broad occupational groupings (*supra*, p. 13). However, even if we were to assume—despite the lack of supporting evidence—that the "survey" proved more than its author claimed for it, and that it somehow established that the number of persons on the special list engaged in "banking" and similar occupations was out of proportion to their representation in the community at large (Manhattan), and if we were further to assume that such persons necessarily belong to the "upper stratum" of society, the Mayell survey would still be a long way from suggesting—let alone establishing—that the list of special

jurors was deliberately weighted in favor of any class or group (see petition, pp. 4, 13).

Perhaps the best illustration of the weakness of the petitioners' position—even after all the foregoing assumptions have been made in its favor—is found in the contrast between the facts at bar and those presented in *Smith* v. *Texas*, 311 U. S. 128—the decision upon which the petitioners principally rely (petition, p. 10).

In the *Smith* case, deliberate discrimination against Negroes in the drawing of grand jurors was established by showing that: (a) an unmistakable pattern of discrimination had existed over a period of nine years; (b) the jury commissioners were aware of this situation and had even "discussed" the total absence of Negroes from the grand jury that had indicted the petitioner (311 U. S., at p. 131; *cf. Hill* v *Texas*, 316 U. S. 400, 404); and that (c) the jury commissioners had devised a system whereby thirteen out of the eighteen Negroes actually summoned for grand jury service during the nine years in question found themselves in last place on a list of sixteen talesmen, in circumstances "under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list" (311 U. S., at p. 131).

Here, on the other hand, the record discloses: (a) no pattern of any kind—the petitioners' so-called evidence relating exclusively to the condition of a constantly changing panel on one particular day; (b) the jury officials' absolute ignorance of any disproportion that may have existed in the panel's makeup; and (c) nothing even remotely suggesting a plan to keep any qualified juror from serving.

Most significant is the circumstance that the petitioners' so-called evidence relates exclusively to the condition of the panel on one particular day, and their consequent total

failure to establish any *pattern* of alleged discrimination. In no case has this Court upset a state court's finding of no discrimination unless the exclusion complained of was expressly required by a state statute (*Strauder* v. *West Virginia*, 100 U. S. 303; *Bush* v. *Kentucky*, 107 U. S. 110), or was established by a history of discrimination extending over a sufficient number of years to compel a finding that the exclusion had been deliberate [*cf. Akins* v. *Texas*, 325 U. S. 398, 402-404, with *Neal* v. *Delaware*, 103 U. S. 370, 397 ("no colored citizen had ever been summoned as a juror"); *Norris* v. *Alabama*, 294 U. S. 587, 596 ("a generation or longer"); *Hollins* v. *Oklahoma*, 295 U. S. 394, 395 ("for a long period"); *Hale* v. *Kentucky*, 303 U. S. 613, 614 ("from 1906 to 1936"); *Pierre* v. *Louisiana*, 306 U. S. 354, 359 ("from 1896 to 1936"); *Hill* v. *Texas*, 316 U. S. 400, 403 (at least "twenty-seven or twenty-eight years")].

The petitioners' position finds no support in *Glasser* v. *United States*, 315 U. S. 60, or *Thiel* v. *Southern Pacific*, 66 Sup. Ct. Rep. 984, 90 Law Ed. (Adv.) 922, the other two decisions of this Court upon which they rely (petition, pp. 12-15). In the first place, neither of those cases involved a constitutional question, both having been decided in the exercise of this Court's "power of supervision over the administration of justice in the federal courts" (see *Thiel* v. *Southern Pacific, supra*, 66 Sup. Ct. Rep., at p. 988; 90 Law Ed. (Adv.), at p. 926). Moreover, if the same rulings had been made on constitutional grounds, they would have strengthened—rather than weakened—the respondent's position in the instant case.

In *Thiel* v. *Southern Pacific*, the challenge to the jury was based upon the testimony of "the clerk of the court and the jury commissioner • • • that they deliberately and intentionally excluded from the jury lists all persons

who work for a daily wage" [66 Sup. Ct. Rep., at p. 986; 90 Law Ed. (Adv.), at p. 924]. In sustaining the challenge upon that unequivocal testimony, this Court went out of its way to make clear that litigants in federal courts are not entitled to a jury containing "representatives of all the economic, social, religious, racial, political and geographical groups of the community," but only to juries selected "without systematic and intentional exclusion of any of these groups" [66 Sup. Ct. Rep., at p. 985; 90 Law Ed. (Adv.), at p. 924]. As we have already shown, the instant record discloses neither "systematic" nor "intentional" discrimination against any class or group.

*Glasser* v. *United States* dealt with an allegation that "all the names of women placed in the box from which the panel was drawn were taken from a list furnished * * * by the Illinois League of Women Voters, and prepared exclusively from its membership, [and] that the women on that list had attended 'jury classes whose lecturers presented the views of the prosecution'" (315 U. S., at pp. 83-84). This Court merely ruled that, had the petitioners established the "deliberate selection of jurors from the membership of particular private organizations," the trial court's denial of their challenge to the panel would have been "a clear abuse of discretion" (315 U. S. 86-87). There is no need to comment further upon the disparity between the allegations made in that case and the facts proved in this one (see *supra*, p. 10).

We note, in passing, that even if total and systematic exclusion of women had been established, no constitutional question would be presented because "It does not even appear that any of the defendants belong to any of the excluded classes" (*Rawlins* v. *Georgia*, 201 U. S. 638, 640).

What we have already said disposes of the insinuation (petition, p. 8) that some sort of discrimination may have been accomplished by use of the question relating to the months within which prospective jurors might "prefer to serve" (*supra*, pp. 11-12).

## Conclusion

Petitioners assert that their constitutional rights were violated by being forced to trial before a jury drawn from a panel selected in a deliberately discriminatory fashion. Their evidence not only fails to support this accusation, but affirmatively establishes its falsity.

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

FRANK S. HOGAN,
*District Attorney,*
*New York County.*

WHITMAN KNAPP,
JOSEPH A. SARAFITE,
*Assistant District Attorneys,*
*Of Counsel.*

September 1946.

# Appendix A

## Provisions of the New York Judiciary Law concerning qualifications and exemptions of jurors in the counties embraced within the City of New York

### § 596. Qualifications of jurors.

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section.

### § 597. Juror with scruples against death penalty.

No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has

conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.

**§ 598. Disqualifications.**

(Omitted as irrelevant)

**§ 599. Exemptions.**

Each of the following persons only, any inconsistent provision of law to the contrary notwithstanding, although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom: 1. A clergyman or minister of religion officiating as such and not following any other calling.

2. A practicing physician, surgeon, or dentist having patients requiring his daily professional attention, a licensed pharmacist actually engaged in his profession as a means of livelihood, a duly licensed embalmer actually engaged in his profession as a means of livelihood, and an optometrist actually engaged in the practice of optometry.

3. An attorney or counsellor at law regularly engaged in the practice of law as a means of livelihood.

4. A person belonging to the army, navy or marine corps of the United States, and the active national guard and naval militia of the state.

5. A member of a fire company or department or police force or department duly organized according to the laws of the state or any political subdivision thereof and performing his duties therein; or an exempt volunteer fireman, as defined in section two hundred of the general municipal law.

6. A captain, engineer, or other officer, actually employed upon a vessel making regular trips; or a licensed pilot actually following that calling.

7. A woman.

8. Until July first, nineteen hundred forty-six, an editor, editorial writer, a sub-editor, reporter or copy reader, actively and regularly employed in the handling or gathering of news for a daily, semi-weekly or weekly newspaper.